U.S. Department of Transportation
Federal Highway Administration

Memorandum

Office of Chief Counsel

Subject: Joint Agency Agreement on ESA's Formal Consultation Process February 18, 2005

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In Reply Refer To:
HCC-1

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This memorandum examines the responsibilities of the of the Federal Highway Administration (FHWA) and the United States Fish & Wildlife Service (USFWS) under the consultation process established under § 7(a)(2) of the Endangered Species Act (ESA), 16 U.S.C. § 1531 et seq., and the regulations implementing that subsection. This memorandum focuses primarily on the timing and information requirements of § 7(a)(2), but addresses other issues as well. It explains FHWA's role and responsibility in initiating the consultation process, but also states USFWS' responsibility in this § 7(a)(2) process.

This memorandum underscores the importance of FHWA and USFWS working together to protect listed species while respecting FHWA's primary mission of assisting the State Departments of Transportation in the building and maintaining of transportation facilities. This memorandum also emphasizes the importance of completing the consultation process in a timely and efficient manner. Thus, when disagreements cannot be resolved at the local or regional level within the timeframes established by the applicable regulations, the matter should be elevated to the headquarters offices of the agencies involved expeditiously so that important project decisions related to ESA issues are not delayed.

We have worked with the USFWS and Office of the Solicitor of the Interior in developing this memorandum.[1]

Summary

Intergovernmental regulations establish specific time periods in which the § 7(a)(2) consultation process occurs. These regulations make clear that these time periods begin to run when a Federal action agency, such as FHWA, decides to initiate the formal consultation process and supplies the required information. Therefore, by the force and effect of the applicable regulations, the Federal action agency dictates when the consultation should be completed based on the regulatory timeline. Likewise, the content of the biological assessment required under § 7(a)(2) of the ESA is within the discretion of the Federal action agency. The interagency regulations set forth six elements, including the biological assessment, that are required to begin

[1] This memorandum derives from a memorandum dated February, 13 2004 that Lawrence (Lance) P. Hanf prepared for FHWA's Washington State Division Office after they requested a legal opinion on the timing and information requirements of § 7 of the ESA.

the formal consultation process. Moreover, the action agency has an independent duty to use the *best scientific and commercial data available* in the formal consultation process and to insure its action will not jeopardize the continued existence of a listed species. Based on the biological assessment and other information available to it, the USFWS prepares a biological opinion that finds jeopardy or no-jeopardy and makes recommendations of reasonable and prudent measures or alternatives that should be employed. Thus, it is in the interests of both agencies to work together throughout the consultation processes.

Introduction

In 16 U.S.C § 1531, the ESA sets forth the goal of conserving threatened and endangered species (listed species) and the ecosystems upon which they depend. Section 7(a)(2) of the ESA, entitled "interagency cooperation," establishes the process whereby Federal action agencies, their applicants (e.g., State transportation agencies), and the USFWS and National Marine Fisheries Service (NMFS) (hereafter, the USFWS and NMFS jointly are referred to as the Services) work together to ensure that proposed actions are not likely to jeopardize the continued existence of listed species or destroy or adversely modify their designated critical habitats. Implementing procedures are set forth at 50 CFR Part 402.

While action agencies possess considerable discretion regarding the contents of the "biological assessments" used in part to initiate § 7(a)(2) consultation, it is the legal responsibility of these action agencies to ensure through consultation with the Services that their actions meet the legal requirements of § 7(a)(2) of the ESA. To fulfill this responsibility, action agencies must provide the six types of information identified at 50 CFR §402.14(c):

(1) A description of the action to be considered;
(2) A description of the specific area that may be affected by the action;
(3) A description of any listed species or critical habitat that may be affected by the action;
(4) A description of the manner in which the action may affect any listed species or critical habitat and an analysis of any cumulative effects;
(5) Relevant reports, including any environmental impact statement, environmental assessment, or biological assessment prepared; and
(6) Any other relevant available information on the action, the affected listed species, or critical habitat.

From this and other information the Services develop their biological opinions as to the likelihood of the action agencies' proposed activities jeopardizing the continued existence of a listed species and destroying or adversely modifying its critical habitat under standards defined at 50 CFR §402.02.

The biological assessments and other information submitted by the action agency must contain sufficient detail so as to allow the Services to accurately and fully evaluate the direct, indirect, and cumulative effects of their proposed actions and form their biological opinions. Without this, action agencies remain vulnerable to challenges that they have failed to fulfill their § 7(a)(2) responsibilities. In addition, if it turns out that the Services' analysis is incomplete for any reason, including a lack of the information provided by the action agency to develop an accurate opinion, § 7(a)(2) consultation may have to be reinitiated. Even after the Services provide an action agency with a biological opinion regarding the likely effects of action agencies' proposed

activities, the law ultimately charges the action agency with the responsibility of ensuring that the requirements of § 7(a)(2) are met. This shows the ultimate role of the action agency. Congress enacted § 7(a)(2) of the ESA to ensure that both the action agency (FHWA here) and Services as consulting agencies, **work together to achieve this purpose**. Failure of either party to perform in this process may result in unnecessary legal vulnerability. For all of these reasons it is important that strong and positive working relationships be developed between the consulting entities. This means that it is equally important that the action agencies and the Services come to agreement on the information needed to accurately evaluate the potential effects of proposed activities.

This needed cooperation is the foundation of various § 7(a)(2) consultation streamlining processes that are currently underway. Particularly important to these efforts is the use of informal consultation prior to the initiation of formal consultation to ensure that listed resource needs can be incorporated into project designs early in the design process when sufficient flexibility exists to make modifications without disrupting project development and implementation. This is also the time when the agencies should work together to develop the information that will be needed to evaluate the potential effects of the proposed action. Other important streamlining efforts include the development of joint FHWA-Services training efforts and FHWA's funding of Service positions to facilitate the timely completion of § 7(a)(2) consultation.

The Section 7(a)(2) Duties

When the Federal government takes an action subject to the ESA, it must comply with § 7(a)(2) of the ESA. Section 7 (a)(2) states:

> "Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available."

Courts have found two duties for a Federal action agency embodied in this section. The first is an independent substantive duty for each Federal action agency to insure its action will not jeopardize the continued existence of an endangered species or result in the destruction or adverse modification of critical habitat. To this end, a Federal action agency must use the *best scientific and commercial data available* in assessing the effects of the proposed action. The second duty is procedural and is to consult with the Services and to use their assistance regarding this first duty to not jeopardize a listed species.

These are independent duties, and both must be fulfilled to comply with § 7(a)(2). Pyramid Lake Paiute Tribe of Indians v. U.S. Dept. of Navy, 898 F.2d 1410, 1415 (9th Cir. 1990); Stop H-3 Ass'n v. Dole, 740 F.2d 1442, 1459 (9th Cir. 1984) cert. denied, 471 U.S. 1108 (1985). As is

noted in the preamble of the ESA rules, the purpose of § 7(a)(2) is "to insure that any [agency] action is not likely to jeopardize the continued existence of any endangered species..." 51 Fed. Reg. 19926 (June 3, 1986). In short, the consultation is not an end in itself, but a process for Federal action agency to insure it does not jeopardize the listed species. Roosevelt Campobello International Park Comm. v. U.S. EPA, 684 F.2d 1041, 1049 (1st Cir. 1982). That being said, if the Service's biological opinion determines that a Federal action agency's project would "jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species," the Federal action agency would be unwise to go forward with the project unless it requests an exemption under 16 U.S.C. § 1536(h). This is because as a practical matter, it would be extremely difficult for an action agency to demonstrate compliance with the ESA in the face of such a biological opinion.

Further, it should always be remembered that "[a]ll other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species..." 16 U.S.C. § 1536(a)(1). However, regarding this [(a)(1)] duty to support the goals of the ESA, a Federal action agency has very broad discretion in fulfilling that duty. Pyramid Lake Paiute Tribe of Indians v. U.S. Dept. of Navy, 898 F.2d at 1417 (9th Cir. 1990); 50 CFR § 402.14(j).

It is the substantive duty of the Federal action agency not to jeopardize the listed species and § 7(a)(2) does not give the Services veto power over the action. As one court noted: "[O]nce an agency has had meaningful consultation with the Secretary of Interior concerning actions which affect an endangered species the final decision of whether or not to proceed with the action lies with the agency itself." National Wildlife Federation v. Coleman, 529 F.2d. 359, 371 (5th Cir. 1976). "An agency's duty to consult . . . does not divest it of discretion to make a final decision" once it concludes it has done all it can to not jeopardize a listed species. Roosevelt Campobello International Park Comm. v. U.S. EPA, 684 F.2d 1041, 1049 (1st Cir. 1982).

In addition, though regulations at 50 CFR 402.12(c) identify the information necessary to initiate formal consultation, the regulation explicitly states, "that the contents [of the biological assessment] are at the discretion of the Federal [action] agency." 50 CFR § 402.12(f).[2] This is confirmed by numerous court decisions. See, City of Sausalito v. O'Neill, 211 F. Supp.2d 1175 (N.D. Cal. 2002); Defenders of Wildlife v. Babbitt, 130 F. Supp.2d 121, 126, n. 4. (D.D.C. 2001); Water Keeper Alliance v. U.S. Dept. of Defense, 271 F.3d 21, 33 (1st Cir. 2001); Strahan v. Linnon, 967 F.Supp. 581, 594 (D. Mass. 1997); Bay's Legal Fund v. Browner, 828 F. Supp. 102, 110 n.19 (D. Mass 1993).

As the one court said: "[A] complete failure to conduct a biological assessment when required is subject to judicial review, but the contents of the assessment are not." There is no mandate about what goes into a biological assessment or its structure. The action agency may use a draft environmental impact statement to document its biological assessment. City of Sausalito v. O'Neill, 211 F. Supp.2d at 1204.

This is further supported by the section-by-section analysis of the ESA found in the Federal Register that states:

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[2] As discussed above, however, in order to initiate consultation, the information identified in 402.14(c) must be provided.

> "The Service agrees that assessments should be as complete and thorough as possible, but declines to impose strict minimum standards that all biological assessments must satisfy. . . Therefore, a new paragraph (f) [50 CFR § 402.12(f)] only contains suggestions of what a Federal agency may include in a biological assessment . . . Basically, the assessment serves as an analytical instrument and can be used by the Federal agency 'to build its case' as to whether a particular action is likely to adversely affect a listed species or its critical habitat." 51 Fed. Reg. 19947 (June 3, 1986)

In spite of the authority of the action agency, the ESA clearly envisions a cooperative process between the Services and the action agencies.

The § 7(a)(2) Consultation Process

Section 1536(a)(2), title 16, U.S.C., states that a Federal action agency shall insure its project does not jeopardize a listed species "in consultation with and with the assistance of the" Services. In other words, the Services have a consulting role and a duty to assist in the Federal action agency's finding.

If the Federal action agency determines that its project will have no effect on a listed species or designated critical habitat, then § 7(a)(2) consultation with the Services is not required. This occurs if there is no reason to believe that a listed species or designated critical habitat exists in the project area and the project's effects do not impact the listed species or designated critical habitat. This is done by evaluating the action area of the project, which by regulation is determined by the reach of "the direct and indirect effects of the action." If there is any question whether the determination should be "no effect," then coordination and/or informal consultation with the Services should be initiated. This would bolster the action agency's "no effect" determination if challenged.

If the Federal action agency determines that its project "may affect" the listed species or designated critical habitat, it may choose the optional process of entering into informal consultation as outlined in 50 CFR § 402.13. If the Services conclude in writing that the project is "not likely to adversely affect" listed species or designated critical habitat, the informal consultation is over and no further action is required. Id. If the informal consultation finds that the project is "likely to adversely affect" the listed species or designated critical habitat, then formal consultation is required. When it is apparent that a project may adversely affect a listed species or designated critical habitat, it is wise to work with the Services through informal consultation in an attempt to develop conservation measures that may result in a finding of "not likely to adversely affect," thus allowing for consultation to be completed quickly. However, if such a finding cannot be reasonably achieved, even after the start of informal consultation, it behooves us to move directly into the formal consultation process since this process has specific time requirements that add more certainty. This process is explicitly allowed in 50 CFR § 402.14(a).

Duty to Use The Best Scientific and Commercial Data Available

Notwithstanding a Federal action agency's discretion regarding the contents of the biological assessment, both the law and the regulations are clear that the Federal action agency shall use

the *best scientific and commercial data available* for both the formal consultation process and to insure its action will not jeopardize the species. See 50 CFR § 402.14(d) and 16 U.S.C. § 1536(a)(2). Failure to use the *best scientific and commercial data available* to insure "no jeopardy" can result in the Federal agency's action being set aside irrespective of the biological opinion issued by the Services. Resources Ltd. v. Robertson, 35 F.3d 1300, 1305 (9th Cir. 1994). Any legal review of an action agency's duty to use the *best scientific and commercial data available* to insure no jeopardy is reviewed under the deferential standard of "arbitrary, capricious or an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Given this deferential standard, a Federal action agency has some latitude on what is the *best scientific and commercial data available.* This begs the question of what is the relationship between the Federal action agency's duty to insure "no jeopardy" and the Services' biological opinion. Perhaps it is best stated this way:

> "Consulting with the USFWS alone does not satisfy an agency's duty under the Endangered Species Act [citation omitted] An agency cannot 'abrogate its responsibility to insure that its actions will not jeopardize a listed species; its decision to rely on a USFWS biological opinion must not have been arbitrary or capricious." Resources Ltd. v. Robertson, 35 F.3d at 1304 citing Pyramid Lake, 898 F.2d at 1415.

One of the more difficult questions in the ESA § 7(a)(2) process is what the term "*best scientific and commercial data available*" means and what is the duty of both the Federal action agency and the Services under it? This phrase is not defined in either the statute or the governing regulations. In statutory interpretation, the first analysis is what is the plain meaning of the term. City of Chicago v. Env. Defense Fund, 511 U.S. 328, 334 (1994). In this case, one must recognize the modifying word "available." That is, this phrase does not say to make, create or formulate the best scientific and commercial data; it states to use what is *available*. This interpretation is supported by the caselaw cited below.

The phrase the *best scientific and commercial data available* is actually found in a number of areas of the ESA: 1) It is found in the statutory language of § 7(a)(2) imposing a level of information required on the action agency to insure its actions won't cause jeopardy to the listed species. 2) It is required when a Federal action agency begins formal consultation. 3) And it is found when the Services undergo a decision to list a species as threatened or endangered. 16 U.S.C. § 1533(b). It is this later involvement, the listing process, where the courts have primarily interpreted this phrase common to many parts of the ESA.

In Building Industry Ass'n of Superior Cal. v. Norton, 247 F.3d 1241 (D.C. Cir. 2001), the court said this in discussing the scope of the term *best scientific and commercial data available:*

> "Yet as the district court noted, appellants 'have pointed to no data that was omitted from consideration.' Assuming that studies the Service relied on were imperfect, that alone is insufficient to undermine those authorities' status as the "best scientific ... data available." Appellants misread §1533(b)(1)(A): the Service must utilize the "best scientific ... data available," **not the best scientific data possible**. The Service may not base its listings on speculation or surmise or disregard superior data, cf. *Bennett*

> *v. Spear*, 520 U.S. 154, 176, (1997) (Emphasis added); *City of Las Vegas v. Lujan*, 891 F.2d 927, 933 (D.C.Cir.1989), but absent superior data--and appellants point to none--occasional imperfections do not violate §1533(b) (1)(A)." Id. at 1246.

Other courts have followed this lead. In Southwest Center for Biological Diversity v. Norton, 2002 WL 1733618 (D. D.C. 2002), the court said: "Another implication of 'best scientific data available' requirement is that the USFWS must rely on even inconclusive or uncertain information if that is what is available at the time..."

Stated another way, there is no requirement under the duty to use the *best scientific and commercial data available* to conduct new research . Southwest Center for Biological Diversity v. Babbitt, 215 F.3d 58, 60 (D.C. Cir 2000); American Wildlands v. Norton, 193 F. Supp2d 244, 251 (D. D.C. 2002). Nor does the term mean a scientific certainty. Center for Biological Diversity v. Lohn, 296 F.Supp.2d 1223 (W.D. Wash. 2003).

Further, if a Federal action agency relies on "weak data" from the Services' biological opinion to support its duty to insure its actions will not cause jeopardy, it will not fail if there is no other data to challenge it. Resources Ltd. v. Robertson, 35 F.3d at 304; Pyramid Lake Paiute Tribe of Indians v. U.S. Dept. of Navy, 898 F.2d at 1415; Greenpeace Action v. Franklin, 14 F.3d 1324, 1335 (9th Cir. 1993).

In sum, the term "*best scientific and commercial data available*" applies to the Federal action agency both in its general § 7(a)(2) duty to insure it will not jeopardize the continued existence of a listed species, and when it initiates formal consultation with the Services. However, the duty to use the *best scientific and commercial data available* does not mean doing new research, nor reaching scientific certainty. Even if there is only limited or weak data available, an action agency can still proceed to use it if it is the "*best scientific and commercial data available*."

The Services' Request For Additional Data

Once consultation has been initiated, the Services may request additional data pursuant to 50 CFR § 402.14(f). This is a limited request as the regulation states:

> "The Service's request for additional data is not to be construed as the Service's opinion that the Federal agency has failed to satisfy the information standard of section 7(a)(2) of the Act. If no extension of formal consultation is agreed to, the Director will issue a biological opinion using the best scientific and commercial data available." 50 CFR § 402.14(f).

Thus, while it may be in the agency's best interest to furnish additional data, it is not required. In addition, the action agency may, in its discretion, provide the Services additional time to respond. The Service's request for additional information, however, does not necessarily stop the clock, as 50 CFR § 402.14(e) states that any additional time must be *mutually* agreed to. Implicit in this is that the Federal action agency has supplied the required six pieces of information in initiating formal consultation.

The Services' Duty To Reply In The Regulatory Timeframe

All regulations found in the Code of Federal Regulations (CFR) have the force and effect of law and are presumed to be valid. Consequently, the Services cannot choose to ignore the regulations that apply to their program nor can their guidance conflict with the regulations. However, as a general rule, under the principle of one Federal government and the unitary government protocol, Federal agencies cannot sue each other to enforce these regulations or dispute them. However, private parties could bring actions against a Federal action agency if it violated the ESA or if the Services failed to act in some mandatory way.

Once the biological assessment is submitted, 50 CFR § 402.12(j) requires that the Director *will* reply within 30 days stating, "whether or not he concurs with the findings of the biological assessment." There is no discretion regarding the 30-day response. The regulation is silent on what happens if he fails to act, perhaps this is because the Director does not have that option.

As for the timeframe of the formal consultation, 16 U.S.C. § 1536(b)(1)(A) states:

> "Consultation under subsection (a)(2) of this section with respect to any agency action shall be concluded within the 90-day period beginning on the date on which initiated or, subject to subparagraph (B), within such other period of time as is mutually agreeable to the Secretary and the Federal agency."

This 90-day rule is also found in the regulations at 50 CFR § 402.14(e) and in the Final ESA Section 7 Handbook, March 1998, pages 4-5 to 4-7; see also the flowchart at figure 4-1.

After these 90 days expire and the formal consultation is completed, "[w]ithin 45 days . . .the Service shall deliver a biological opinion to the Federal agency and any applicant." Again the word used in the regulation is *shall,* not *may*, or *might*, or as appropriate, or *within its discretion.*

Further, 50 CFR § 402.12(j) allows the Federal agency the option to begin formal consultation at the same time as it submits the biological assessment. The biological assessment is one of the elements required in initiating formal consultation. See 50 CFR § 402.14(c)(5).

In summary, the timeframes listed in the ESA regulations and indeed in the ESA itself, impose strict duties on the Services. The Federal action agency also has important requirements, but it controls both the data that is submitted and any time extensions. The consequence for failing to submit the *best scientific and commercial data available* is that the Services can issue a jeopardy determination, a third party can sue the Federal action agency, or implementation of the action may be interrupted due to the need for re-initiation of consultation as effects that were not previously analyzed are discovered, but again that burden is on the Federal action agency and not the Services.

Federal Action Agency Duty to Avoid Jeopardy

Notwithstanding this independence, Federal action agencies should be mindful of the powerful nature of the ESA as was shown in the landmark case of TVA v. Hill, 437 U.S. 153 (1978). In that case, with 80% of the Tellico Dam completed and $78 million expended, and

notwithstanding the dam was planned and approved before the ESA was passed, the U.S. Supreme Court enjoined the project stating: "Congress has spoken and in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities." Id. at 194. Finding that it had no choice but to enjoin the 80% completed dam, the Court said: "one would be hard pressed to find a statutory provision whose terms were any plainer." Id. at 173. In short, while the Federal action agency has some discretion and control of the § 7(a)(2) process, it also has an affirmative duty to protect listed species from jeopardy even when doing so has enormous financial or societal consequences.

Federal Action Agency's Duty Not To Act Prematurely

After initiation of consultation, 16 U.S.C. § 1536(d) [§ 7(d)] prohibits the Federal action agency from making any irreversible and irretrievable actions that would foreclose reasonable and prudent alternative measures to aid in not jeopardizing a listed species or destroying critical habitat. The 9th Circuit Court of Appeals has made it clear that § 7(d)'s intent is to retain the *status quo* until the consultation is complete. In Sierra Club v. Marsh, 816 F.2d 1376 (9th Cir. 1987), the Court enjoined the project flood control channel and highway construction projects when San Diego County failed to obtain mitigation property as proposed in the earlier consultations. Because of the delay, the U.S. F&W requested to reinitiate formal consultation. Regarding the extreme nature of an injunction and the high monetary costs, the Court went on to note:

> "We are aware of the difficult decision that faced the district court: 'If the court grants the injunction, the combined projects, twenty years in the planning, come to a grinding halt.' Although we do not denigrate the court's concern with the expense and inconvenience to the public an injunction would cause, Congress has decided that these losses cannot equal the potential loss from extinction." Id. at 1386.

Other courts have followed this lead: Conner v. Burford, 848 F.2d 1441 (9th Cir. 1988) (enjoining the U.S. Forest Service from issuing a gas and oil lease until a comprehensive biological opinion was completed); Pacific Rivers Council v. Thomas, 30 F.3d 1050 (9th Cir. 1994); NRDC v. Houston, 146 F.3 1118 (9th Cir. 1998) (enjoining the letting of Bureau of Reclamation water contracts because they violate § 7(d)), Thomas v. Peterson, 753 F.2d 754, 764 (9th Cir. 1985)(Regarding a timber road, the court said "[g]iven a substantial procedural violation of the ESA in connection with a federal project, the remedy must be an injunction of the project pending compliance with the ESA...a failure to prepare a biological assessment is comparable to a failure to prepare an environmental impact statement"); Lane County v. Jamison, 958 F.2d 290, 295 (9th Cir. 1992) (Allowing timber sales to go forward before consultation was a per se violation of § 7(d) of the ESA). Therefore, § 7(d) imposes a requirement for the Federal action agency and any applicants to not casually dismiss their § 7(a)(2) consultation duty and take actions that could *foreclose reasonable and prudent alternatives* that might occur with the start of construction where a listed species is or its critical habitat occurs.

When Problems Arise in the Consultation Process

The foregoing discussion addresses the respective duties of the Services and the Federal Action Agency. The regulations and practices established to implement these duties do not provide

satisfactory solutions when the Services and the action agency disagree or fail to carry out their respective responsibilities. For example, what happens if the Services fail to act within the timeframes set forth in the regulation? Similarly, what remedy is there if the Services find that the information provided by the Federal Action Agency is inadequate, but the Action Agency does not agree?

The regulations would seem to allow the Action Agency to proceed even without a biological opinion or an incidental take statement from the Services at its own risk. By providing all the required data in 50 CFR § 402.14(c) within the required timeframes and showing that its will not be "likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species," FHWA has a legitimate argument that it has met the requirements of 16 U.S.C. § 1536(a)(2). That is, FHWA provided the *best scientific and commercial data available* to consult on, the Services failed to respond, and FHWA has assured itself that no jeopardy will occur to a listed species. However, as a practical matter it is not appropriate for an Action Agency like FHWA to proceed without input from the Services. Without a biological opinion, it becomes much more difficult for FHWA to defend legal challenge based on its failure to consult under the ESA. Without input or a decision from the Services it is much harder to demonstrate that FHWA has not been "arbitrary or capricious."

Without an incidental take statement, those implementing the project are not protected if a species is taken or critical habitat is destroyed leading to a take of the species. Moreover, loss or degradation of even "non-critical" habitat may result in "harm" to species that constitutes a taking of the species. 16 U.S.C. § 1532(19); 50 C.F.R. § 17.3; Babbitt v. Sweet Home Chap. of Communities, 515 U.S. 687 (1995). Violations of the ESA's take prohibitions can be both civil and criminal. 16 U.S.C. § 1540. Contractors, state and Federal employees, and the agencies they work for are subject to this provision. United States v. City of Rancho Palos Verdes, 841 F.2d 329 (9th Cir. 1988). Managers and employees must be aware of this because violations of criminal law are not within the scope of our employment affording them certain protections and benefits, i.e., free U.S. Department of Justice representation and certain governmental immunities.

In short, when problems arise that cannot be readily solved at the local or regional level, it is in the interests of both transportation agencies and the Service to quickly elevate the issue to the headquarters office of the Federal agencies involved. Such elevation is preferable to an extended debate about what might be required or an incomplete record in support of whatever action might be taken with respect to the project. Accordingly, both FHWA and USFWS have agreed that there will be a right to an automatic elevation to the regional offices of the Service and the headquarters office of the FHWA at two decision points where no final action has been taken. The first decision point concerns the submission of the biological assessment by FHWA. The issue will be elevated to the Service's regional offices and the FHWA headquarters if, after forty-five (45) calendar days from the time of submission, the Service has not responded to the FHWA with either a concurrence or a non-concurrence to the FHWA's findings in the biological assessment when the FHWA has submitted its biological assessment to the Service for review and concurrence. The second decision point concerns the issuance of the Biological Opinion by USFWS. At the conclusion of formal consultation (which concludes ninety (90) days after initiation of formal consultation), if the Service does not deliver a biological opinion within

sixty-five (65) days (the 45 day time period set forth in the Service's regulations plus 20 days), the issue will be elevated to the respective regional and headquarters offices. For the FHWA, the issue will be elevated to the Associate Administrator for Planning, Environment, and Realty, and for the USFWS, the issue will be elevated to the Assistant Regional Director, Ecological Services. If FHWA so requests, the issue will be elevated to the Assistant Regional Director and the USFWS' headquarters office simultaneously. Both FHWA and USFWS' field offices shall inform one another that it is elevating the matter and the offices will jointly develop a one to two page written elevation statement that identifies the issues and respective positions.

Conclusion

Federal action agencies, such as FHWA, have substantive duties to use their programs for the conservation of endangered species, to insure their actions do not jeopardize the continued existence of an endangered species or result in the destruction or adverse modification of designated critical habitat, and to insure this it must use the best scientific and commercial data available. Likewise, during the § 7(a)(2) consultation process, Federal action agencies must not take actions that would have the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures to aid in not jeopardizing a listed species or destroying designated critical habitat.

Notwithstanding these duties of the Federal action agency, the Services have no veto power over a project. The intent of the ESA is that the Services provide assistance and consultation to further the Federal action agency's duty. The Services are consultants to the § 7(a)(2) process where the focus is on the Federal action agency's findings and actions.

While it is always best to reach agreement during the consultation process, if disagreements arise that cannot be efficiently addressed at the local or regional level, as discussed above the matter should be forwarded to the respective regional and headquarters offices of the agencies involved for resolution to allow the project to not be held hostage to local offices' disagreement.

The explicit wording in the ESA statute and implementing regulations allow or require:

- A Federal action agency to initiate formal consultation and start the regulatory clock by submitting the information required under 50 CFR 402.14(c).
- The Federal action agency discretion regarding the contents of the biological assessment.
- The Services to issue a biological opinion within 135 days from initiation of formal consultation (45 days after the 90 day formal consultation period).
- The Federal action agency to use the *best scientific and commercial data available* in both formal consultation and in the Federal action agency's duty not to jeopardize the listed species, but this data must be available and does not have to be created by the Federal action agency.
- That a Federal action agency may agree to submit additional data or allow for a time extension, but it is not required to do so.